FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PRIVATE PETITIONERS

EDWARD D. REIBMAN
108 North Eighth Street
Allentown, Pa. 18101

CRESSIE H. THIGPEN, JR.
Thigpen, Blue & Stephens
Suite 214
Hallmark Building
Raleigh, North Carolina 27601

JULIUS LEVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

*Counsel of Record

TABLE OF CONTENTS

		Page
I.	The Application of Discriminatory Pre-Act Salary Scales	1
II.	Statistical Evidence of Discrimination	5
III.	NCAES' Legal Responsibility for Discrimination in the Selection of County Chairmen	21
IV.	Desegregation of the 4-H and Extension Homemaker Clubs	27
Conclusion		45

TABLE OF AUTHORITIES

Cases	Page
Arizona Governing Board v. Norris, 403 U.S. 1073 (1983)	23
Board of Visitors v. Norris, 404 U.S. 907 (1971)	40
Branti v. Finkel, 455 U.S. 507 (1980)	26
Carter v. Greene County, 396 U.S. 320 (1970)	25
Davis v. United States, 411 U.S. 233	26
Elrod v. Burns, 426 U.S. 347 (1976)	26
Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979)	40
Green v. School Board of New Kent County, 391 U.S. 430 (1968)	30,40
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	16,17
Hazelwood School District v. United States, 433 U.S. 299 (1977)	21

Page

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 11

Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) 25

Monroe v. Pape, 365 U.S. 167 (1961) 26

Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976) 42,43

Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) 26

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 91971) 40

Teamsters v. United States, 431 U.S. 324 (1976) 11,16

United States v. Logue, 344 F.2d 290 (5th Cir. 1955) 24

United States v. Manning, 205 F.Supp. 172 (W.D. La. 1962) 24

United States Postal Service v. Aikens, 460 U.S. 711 (1983) 9

Page

Statutes

Title VI, Civil Rights Act of 1964 35

Title VII, Civil Rights Act of 1964 ..... passim

Voting Rights Act of 1965 24

7 C.F.R. § 15.3(b)(6)(i) 39

I. THE APPLICATION OF DISCRIMINATORY PRE-ACT SALARY SCALES

Respondents apparently do not defend the fourth circuit's holding that both Title VII and the Fourteenth Amendment permit a public employer to apply a salary scale which was originally adopted for discriminatory purposes. Respondents argue only that the courts below erred in holding that NCAES had engaged in systematic salary discrimination prior to 1965. (R. Br. 30-34).

Respondents acknowledge that at least prior to 1965 it was the policy of NCAES to pay blacks lower salaries than whites doing the same work. Respondents insist that this policy was not the result of "intentional racial discrimination", but merely stemmed from a desire to save money. (R. Br. 32) Because there was less of a demand in "the competitive

market" for skilled blacks than for comparable whites, respondents urge, it was entirely reasonable to pay blacks a lower salary. (R. Br. 31) Respondents assert that the absence of invidious discrimination is established by the testimony of Director Blalock, who asserted that there were differences in the salaries of black and white employees "not because of intentional discrimination on anybody's part but reflecting ... the fact that black agricultural agents could be hired and retained at a lower salary than white agricultural agents." (R. Br. 31-32, quoting C.A. App. 995-99).

This argument misapprehends the nature of the statutory and constitutional prohibitions against intentional discrimination. Those prohibitions are not limited to cases in which an employer acts out of a malicious hatred of blacks,

women, or any other protected group. Title VII and the Fourteenth Amendment forbid a covered employer, in fixing the salary for a particular employee or position, from taking into account for any reason the race, sex or national origin of the individuals involved.[1] If, as Blalock acknowledged, it was the practice of NCAES to set a different salary for a particular employee based on his or her race, that practice constituted discrimination within the meaning of Title VII and the Fourteenth Amendment, regardless of whether the practice was adopted as a means to save money or as a means to stigmatize black workers.

---

[1] This case presents no issues regarding when an employer might take race or sex into account for benign reasons, such as to rectify past societal discrimination.

The "competitive market" defense proposed by respondents could, if accepted, largely nullify the statutory and consittutional prohibitions against discrimination. Title VII was adopted precisely because widespread discrimination had reduced the job opportunities generally open to, and the salaries ordinarily paid to, blacks, women and others. Such invidious practices not only affected the wages given to particular individuals, but forced down the salaries paid for positions generally or exclusively filled by members of one of the disfavored groups. It is inconceivable that Congress intended the existence of an industry wide practice of discrimination to become a legal justification for paying lower wages to members of the victimized group. Title VII was adopted to assure that the salary paid to an employee would

be a function of his or her skills and contributions, not a measure of the extent to which other employers had or still discriminated against other individuals of the same race or sex.

II. STATISTICAL EVIDENCE OF DISCRIMINATION

The Solicitor General urges this Court to adopt a very specific and rather complex set of standards to be applied in evaluating whether statistical evidence is sufficient to establish a prima facie case of discrimination. (U.S. Br. 22-28) We agree that the considerations discussed in the Solicitor's brief would be relevant to an evaluation of the weight to be accorded the statistical evidence in any given case, but urge the Court to eschew adoption of any rigid standard regarding what type of statistics are necessary to establish a prima facie case.

Because the exact contours of the Solicitor's proposed rule would be of considerable importance if adopted by the Court, we set forth below our understanding of the details of the Solicitor's proposal: (a) If a plaintiff establishes a simple statistical disparity, such as differences in the average salary paid to blacks and whites in the same job, that is sufficient to create a prima facie case only if the defendant offers no evidence regarding how it made the challenged salary or other decisions. (b) If a defendant establishes through the introduction of probative evidence[2] the nature of the "major" non-discriminatory factor

---

[2] The Solicitor emphasizes on several occasions that the identity of these factors must be based on evidence (U.S. Br. 26-27), and that the factors must be those most relied on by the defendant at issue, not by employers generally. (U.S. Br. 27)

or factors influencing its decision, the plaintiffs' statistical evidence is to be treated as inadequate, and insufficient to establish a prima facie case, unless the plaintiff proves that those factors could not explain the disparity. In order to thus eviscerate a prima facie case, a defendant need not introduce any evidence, however, that those "major" factors had actually in any way contributed to the proven disparities. (c) A plaintiff is only obligated to include in his analysis "major" factors that the defendant has delineated with a reasonable degree of specificity; a general preference for "prior experience", for example, would not meet that requirement. (U.S. Br. 34) (d) Rule (b) does not apply to any factor which the defendant failed to identify as a "major" consideration at a point sufficiently prior to trial to permit

plaintiff to recalculate his statistics. (U.S. Br. 31 n.30) (e) A plaintiff need not include in his statistical analysis any factor he claims is tainted by discrimination, provided that he offers "some proof" of such taint. (U.S. Br. 27 n.24, 33 n.34) (f) If a defendant contends that a "non-major" factor accounted for a disparity, the defendant must prove, not only that it relied on that factor, but also that "inclusion of the factor would have eliminated the statistically significant effect for race". (U.S. Br. 26) (g) A plaintiff is not required, as part of his prima facie case, to consider a factor that is impossible to measure or quantify. (U.S. Br. 33 n.34, 34 n.35).

We agree that a court might well consider all these as well as other criteria in assessing the weight of sta-

tistical evidence offered by either party. But the Solicitor's elaborate 7-part test for determining whether statistics establish a prima facie case is precisely the sort of "rigid, mechanized or ritualistic" approach which this Court has condemned as a method for ascertaining whether a plaintiff has established a prima facie case. U.S. Postal Service v. Aikens, 460 U.S. 711, 715 (1983). Aikens made clear that, in evaluating a discrimination claim, courts should ordinarily focus on "the ultimate question of discrimination vel non", 460 U.S. at 714, rather than becoming embroiled in scholastic disputes about the precise quantum of evidence necessary to establish a prima facie case. It is certainly true, as the Solicitor suggests, that a statistical analysis which evaluates a larger number of relevant variables is more probative,

and deserves greater weight, than a less sophisticated analysis. Such differences, however, bear primarily on the weight of the evidence, not on its admissibility or its sufficiency to establish a prima facie case. Only rarely should a court hold that accurate statistically significant statistical evidence of a racial disparity in wages, hiring or promotions is insufficient even to require a defendant to offer a legitimate non-discriminatory explanation of that disparity.

Burdine does not, as the Solicitor suggests, insist that a plaintiff, as part of his prima facie case, demonstrate conclusively that a challenged act could possibly not be explained by any of "the most common nondiscriminatory reasons" for actions of the sort at issue. (U.S. Br. 22) In a hiring case, for example, a plaintiff need only establish that he was

qualified and that a vacancy existed. Burdine, 450 U.S. at 253 n.64. As the Court noted in Teamsters v. United States, 431 U.S. 324 (1976), such evidence addresses "the two most common legitimate reasons on which an employer might rely to reject a job applicant", 431 U.S. at 358 n.44 (emphasis added), but these clearly are not all of the "most common", "most important" or "major" reasons why a black applicant might be rejected. Many applicants, white as well as black, are also rejected because, although qualified, they are less skilled than other applicants; in some instances the vast majority of unsuccessful applicants may be rejected for that reason. Yet Burdine, Teamsters and McDonnell Douglas v. Green, 411 U.S. 792 (1973), all make clear that an unsuccessful applicant can establish a prima facie case of discrimination without

offering evidence of comparative qualifications, or proving that any other "common" explanation could not account for his rejection.

Any attempt to implement the Solicitor's 7-part rule would necessarily embroil the courts in arcane disputes about the meaning of the Solicitor's terminology. The Solicitor's proposal requires the courts to divide into two categories the types of non-discriminatory reasons on which an employer could rely in taking a disputed action.[3] One category is variously denoted as including the "major" (U.S. Br. 24, 26) or "most common" (U.S.

---

[3] The Solicitor argues that this distinction was adopted by the court of appeals. (U.S. Br. 21). But the fourth circuit requires a plaintiff to include in his calculations "all measurable variables thought to have an effect on salary" (Pet. App. 391a)(emphasis added), regardless of whether or not those variables were "major".

Br. 22, 23, 24, 25) or "most important " (U.S. Br. 29) reasons for such actions; the other group is referred to by the Solicitor as simply "additional" reasons. (U.S. Br. 26) The Solicitor proposes that a plaintiff be required, as part of his prima facie case, to demonstrate the absence of any of the "major" legitimate reasons; the defendant, on the other hand, bears the burden of establishing the presence of one of the "additional" reasons. Whether a non-discriminatory factor is "major" or merely "additional" turns, the Solicitor explains, on the practices of the employer at issue. (U.S. Br. 27) Thus attendance might be a "major" factor in fixing salaries at one firm, but only an "additional" factor at another employer. The Solicitor offers no explanation of how a court is to decide whether to categorize a factor as "major"

rather than "additional". What is clear, however, is that under the Solicitor's rule the outcome of many Title VII cases would turn largely on which label was given to a particular factor.

We do not believe that the result of litigation such as this should be determined by a scholastic debate about whether a particular factor is "major" or merely "additional". The importance of any given factor will always be a question of degree, and the omission of any one variable may be of greater or lesser significance in light of the number and nature of the variables that were analyzed. Under most circumstances it will not be possible for either party to construct a statistical study that includes every factor that might account for a disputed employment practice. The number and nature of any variables that a

plaintiff or defendant may have omitted from its statistical analysis may detract, to a minor or at times substantial degree, from the weight to be accorded that evidence. A party seeking to attack the completeness of such an analysis ought ordinarily introduce probative evidence that inclusion of an omitted variable or variables would in fact have altered the result, rather than merely offering an argument that the omitted variable was "major" or "important".

The Solicitor's 7-part rule, even if it were workable, would make little sense in the context of a Title VII claim. Title VII prohibits practices with an unnecessary discriminatory effect, as well as practices adopted for a discriminatory purpose. Where a plaintiff establishes that an employer's decision-making process, such as its procedure for fixing

salaries, has an adverse effect on blacks, the employer must not only demonstrate the absence of any racial motive, but must also establish that the criteria used to set those salaries were justified by business necessity. An employer could not defend a salary discrimination claim, for example, merely by proving that among employees performing the same job it had chosen to pay a higher salary to those with high school degrees. Cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Evidence that an employer hires, promotes, or pays better salaries to a disproportionate number of whites ordinarily establishes, not only a prima facie case of disparate treatment under Teamsters, but also a prima facie case of disparate impact under Griggs. Teamsters v. United States, 431 U.S. 324, 335 n.15.

Where a plaintiff asserts both a disparate impact and a disparate treatment claim, no useful purpose would be served by requiring that statistical evidence of disparate treatment be refined to encompass all "major" or "important" factors. Although a plaintiff might fail to satisfy such a requirement, even relatively unsophisticated statistics, such as evidence that an employer hired a disproportioonately low number of black applicants, would establish a prima facie case under Griggs. The process of identifying the criteria that had caused that disparity, and that thus required a business necessity justification, clearly would not be assisted by distinctions between "major" and "additional" criteria, or by arbitrary presumptions regarding which criteria had caused which disparities.

Our disagreement with the Solicitor is a narrow albeit important one The considerations set forth in the government's brief would, we agree, be helpful in analyzing the weight of statistical evidence, and might usefully be applied in weighing statistical evidence offered by a defendant as well as that introduced by a plaintiff. We differ from the Solicitor only insofar as he suggests that the Court fashion from those considerations a set of rules defining what particular combination of variables must as a matter of law be included in a statistical analysis offered to establish a prima facie case of intentional discrimination. The infinite varieties of statistics, we urge, do not lend themselves to the framing or administration of such rigid rules, and adoption of this approach would divert Title VII litigation from an inquiry into the merits

of a plaintiff's claim into often arcane disputes about the nature of the statistical refinements that would be necessary to meet an increasingly complex standard for establishing a mere prima facie case.

We expressly endorse the Solicitor's recommendation that district judges be encouraged to make clear what types of statistical analyses they believe are important in a given case, and to afford the parties a reasonable opportunity to fashion and offer that evidence. (U.S. Br. 28) Where statistical evidence is relevant to a civil case, there will almost invariably be disputes and uncertainty as to how statistical analyses should be constructed, and as to which party bears the burden of doing so. Frequently the nature of the statistical analyses that would be appropriate in a particular case will not be apparent on

the face of the initial pleadings. A substantial amount of discovery will often be required before the trial court, or the parties, will have a sufficient command of the circumstances and nature of the claims to understand what types of statistical analyses would be relevant. Disputes about the manner in which such analyses should be conducted ought where possible be aired and resolved prior to trial, and, particularly where the analyses involved are complex and expensive, prior to the point at which the analyses themselves are prepared. Where a trial or appellate court concludes that the statistical evidence is sufficiently defective as to undermine the court's confidence in its ability to accurately resolve the merits of the claims, the interests of justice would best be served by reopening the record, rather than by directing judgment

against a party which reasonably failed to anticipate that it would be held responsible for offering such evidence. Cf. Hazelwood School District v. United States, 433 U.S. 299 (1977). In the instant case, however, that clearly is not necessary.

III. NCAES' LEGAL RESPONSIBILITY FOR DISCRIMINATION IN THE SELECTION OF COUNTY CHAIRMEN

The Solicitor General characterizes the selection of county chairmen as "a joint employment decision" of both NCAES and the counties. (U.S. Br. 35) The Solicitor urges that both parties to a "joint employment decision" are legally responsible for that decision under Title VII, and that there is thus no need to decide whether, in the absence of such a

"joint decision", Title VII might under some circumstances impose a form of "vicariou[s] liab[ility]". (U.S. Br. 36)

It is not clear whether the "joint decision" doctrine espoused by the Solicitor differs from the position set forth in our principal brief regarding the delegation of governmental authority to third parties. In the instant case no NCAES official actually participated in any way in the final choice among two or more names referred to a county; where several applicants were approved by NCAES, only county employees made the choice amongst them. This relation was a "joint decision" only the sense that NCAES had a right, which it waived in advance, to participate in that choice. The right enjoyed by NCAES was indistinguishable from the inherent right of any employer to determine the

terms and conditions of employment. If, on the Solicitor's view, the original existence of such a right renders an employment decision delegated to a third party a "joint decision", that would be equally true regardless of whether the employer waived its right, as here, on an ad hoc basis, or waived that right for a specific period of time, as occurred in Arizona Governing Board vs. Norris, 403 U.S. 1073 (1983).

The Solicitor may be urging, however, that the Fourteenth Amendment and Title VII permit intentional racial discrimination in the administration of governmental activities so long as the person who exercises discriminatory authority over those activities is not himself a paid employee of the state. Adoption of such a rule would give legitimacy to what was long one of the

most common segregationist tactics in the nation. For decades states sought to avoid applications of the Equal Protection Clause by delegating key decisions to private citizens, and the federal courts responded by resolutely declaring such schemes unconstitutional. Alabama and Louisiana, for example, at one time required prospective voters, as a condition of registration, to be "vouched for" or "identified" by a person who was already registered; that practice was declared unconstitutional when it became apparent that existing voters would not vouch for or identify blacks.[4] The University of Mississippi delegated to alumni control over the university's

---

[4] United States v. Logue, 344 F.2d 290 (5th Cir. 1955); United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962). These practices were forbidden by §4(c) of the 1965 Voting Rights Act.

admission decisions, requiring all applicants to obtain a letter of recommendation from at least one alumnus; when none of the alumni would endorse James Meredith's application, the fifth circuit held that the state could not constitutionally implement the discriminatory preferences of those alumni.[5] In Alabama responsibility for selecting prospective jurors was at one time effectively delegated to private citizens known as "key men", who in practice selected only whites; no member of this Court doubted that the state was constitutionally responsible for that invidious discrimination. Carter v. Greene County, 396 U.S. 320 (1970).[6] This Court

---

[5] Meredith v. Fair, 298 F.2d 696, 701-02 (5th Cir. 1962).

[6] "Under a 'key man' system, jury commissioners ask persons who are thought to have wide contacts in the community to supply the names of prospective jurors."

has twice held that state employees may not be dismissed from non-policy making positions merely because of their political affiliations; in both instances the key decisions not to retain the Republican plaintiffs had been made by Democratic party officials, not by any state employee.[7] These decisions make clear that unconstitutional discrimination occurs whenever "the wrongdoer is clothed with the authority of state law", Monroe v. Pape, 365 U.S. 167, 184 (1961), regardless of whether or not that wrongdoer received a state salary or held any official state title.

Davis v. United States, 411 U.S. 233, 246 n.2 (1973)(Marshall, J., dissenting). See also Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

[7] Branti v. Finkel, 455 U.S. 507, 510 n.5 (1980); Elrod v. Burns, 426 U.S. 347, 351 (1976).

IV. DESEGREGATION OF THE 4-H AND EXTENSION HOMEMAKER CLUBS

In North Carolina today thousands of black children and homemakers belong to all-black state and federally-supported 4-H and extension homemaker clubs. In the case of the extension homemaker clubs, the segregation is virtually absolute; according to the most recent data, less than 50 black homemakers in the entire state belonged to a club with any white members. (GX 7) Similarly, witnesses from nine counties with substantial non-white populations testified that all or virtually all of the black 4-H club members in those counties were in all-black clubs.[8]

---

[8] Tr. 1082 (Gates), 1526-38 (Union), 1638-9 (Wilson), 1739-42 (Granville), 1765-66 (Vance), 1967 (Halifax), 2446 (Northhampton), 2450-51 (Washington), 2556 (Pasquotank).

The Solicitor General asserts that this state of affairs is attributable "solely to decisions freely made by private actors". (U.S. Br. 48) According to the Solicitor, the black women and children of North Carolina have spontaneously decided to establish a system of voluntary and at times complete apartheid, preferring to avoid any association with white homemakers and children in connection with 4-H and extension homemaker activities; racial isolation exists in these federally funded activities, the Solicitor suggests, solely because blacks chose, often with complete unanimity, to have nothing to do with whites. The Solicitor does not explain why these black women and children, who may work, meet or play with whites in all other aspects of their lives, would be adamantly opposed to participating jointly with the same whites

in 4-H or extension homemaker activities. The Solicitor nonetheless urges the Court to respect those alleged segregationist preferences of black North Carolinians, and to avoid tampering with the NCAES system that fosters and facilitates such racial separation.

Nothing in the record, however, provides any support for the Solicitor's theory that black North Carolinians have any such segregationist preferences; not a single witness testified that black women or children preferred to avoid contacts with whites. Freedom of choice has failed, we urge, not because blacks have spurned participation in integrated activities, but because blacks have generally been denied any meaningful opportunity to choose such activities.

For over 20 years black women and children in North Carolina have faced the same dilemma as the students in Green v. School Board of New Kent County, 391 U.S. 430 (1968), with the same result. In July of 1965, when NCAES replaced its policy of mandatory segregation with a freedom of choice plan, there were no integrated 4-H or extension homemaker clubs to join in any community in the state. A black had only two options, to participate in the very all black club originally established by NCAES on a racial basis, or to join an all-white program as the first, only, and quite possibly unwelcome non-white member. For a 10-year old black farm boy who only wanted to learn how to grow corn, for black housewives who needed assistance getting by on meager income, the message of intolerance communicated by a club's all-white membership was as effective a

deterrent as the "Whites Only" signs of the past. The price of admission to an all-white club was the courage and determination of a Rosa Parks or a Linda Brown; for most black women and children in North Carolina that price proved too high. Little has changed since NCAES first adopted that freedom of choice plan. Today in hundreds of communities across the state, all of the NCAES sponsored clubs are still all-white or all-black, and black women and children remain understandably reluctant to shoulder the burden, so long shirked by the state, of desegregating that system.

(1) Both the district court and the court of appeals believed that Title VI and the Fourteenth Amendment only require NCAES to cease enforcing its pre-1965 segregation policy, and impose on NCAES no obligation to undo the continuing effects

of that unconstitutional and unlawful policy. The Solicitor General expressly disavows this narrow view of NCAES' obligations:

> It is not disputed that the Service engaged in ... deliberate segregation ... and thus "automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory ... system.'" Such remedial efforts are necessary "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" ... by eliminating the condition that violates the Constitution and the conditions that flow from such a violation.

(U.S. Br. 40) (Emphasis added). NCAES could not satisfy that obligation by "simply announc[ing] that it w[ould] henceforth conduct admissions without regard to race." (U.S. Br. 43) An agency such as NCAES must make

> diligent oversight and remedial efforts to ensure that [its] practices are not tainted by discrimination, and do not send a subtle discriminatory message, that its personnel are sensitized to the need

> to treat applicants and potential applicants in a wholly nondiscriminatory manner, that its present and future practices do not have the effect of impeding desegregation, and that it is made clear to all that any practices discouraging or diminishing racial mixing are truly a thing of the past.... Against the backdrop of recent blatant discrimination, affirmative recruitment activities will normally be an important part of this nondiscrimination effort....

(U.S. Br. 43-44.) Neither the Solicitor nor the respondents suggest that NCAES ever made any such efforts, or took any action whatever other than the adoption of the disputed freedom of choice plan.

The Solicitor recognizes two problems of particular importance that must be addressed by an agency such as NCAES. First, where a government program has been deliberately organized along racial lines, the responsible agency must take whatever steps are necessary to eliminate the pattern of racial separation brought about

by past government action. "To do otherwise would perpetuate the prior de jure segregation by leaving intact conditions that are directly attributable to the unconstitutional actions of state actors." (U.S. Br. 42). Both the constitution and Title VI guarantee to each person "an equal opportunity to participate in government activities free from ... racial separation attributable to state action." (Id, 43). The Solicitor also correctly acknowledges that "the truly free exercise of choice by private actors" will often require that a state do more than merely rescind its prohibition against black participation in an all-white club or school. (U.S. Br. 43). Less blatant practices may impede the process of desegregation, or "send a subtle discriminatory message" that will deter blacks from joining state programs or

transferring to schools from which they were previously excluded. (U.S. Br. 43). State practices that are far less extreme than formal legal exclusions can impair or deter the exercise of the rights protected by both Title VI and the constitution.

Having articulated these standards, however, the Solicitor summarily asserts that "the lower courts found that the respondents had fully cleansed the clubs of any such racially based activities and that racial imbalance is solely the product of unfettered private action." (U.S. Br. 44). As Judge Phillips emphasized in his dissenting opinion below, however, no such findings are contained in either of the lower court decisions in this case. Both the Fourth Circuit and the District Court appear to have assumed that the only relevant issue was whether NCAES still had a policy of segregating

the clubs on a racial basis, and the decisions below are limited to a holding that blacks are no longer rejected for membership because of their race. Neither opinion below contains any reference to either of the issues that the Solicitor correctly recognizes as critical -- whether the present composition of the clubs is a result, at least in part, of the racial basis on which those clubs were originally organized, and whether such lingering effects impede or deter blacks from joining clubs that were established and continue to operate on on all-white basis. (Pet. App. 165a-185a, 424a n. 128).[9]

---

[9] The district court opinion, after an extended discussion of evidence that NCAES no longer forbids blacks to join white clubs, states:

> "No individual has been 'subjected' to segregation or separate treatment by the defendants. If any individual has become a member of a club com-

(2) The Solicitor's brief contains a number of passages which appear to assert that a state has no obligation whatever to disestablish a de jure system, and that a state can fully satisfy the requirements of the constitution and Title VI merely by rescinding the rules which created that de

---

> posed only of members of his or her own race, it has been an entirely voluntary act without any force or coercion on the part of the Extension Service. Indeed, the Extension Service requires that each club formed certify that membership is open to all races."

(Pet. App. 172a). In the context in which it occurs, the second sentence clearly asserts only that no NCAES rule or practice forbids blacks from joining all white clubs; this passage does not purport to decide whether pressures short of "force or coercion" may be inhibiting or deterring blacks from joining all-white clubs, or whether the present degree of racial separation is causally related to the previous policy of de jure segregation. The respondents never claimed or sought to prove that black women or children preferred not to associate with whites; a finding that any such preferences existed would thus be clearly erroneous.

jure segregated system. The Solicitor first asserts, in a apparent reference to NCAES,

> Where a state has not assigned persons during ... the de jure period ... to a particular program, there is no state-controlled atttendance pattern, discriminatory or otherwise, to undo or withdraw. Thus ... a genuinely race-neutral policy will ... fully dismantle the old system.

(U.S. Br. 42-43) (Emphasis in original). Prior to 1965, however, as NCAES candidly concedes, club members were avowedly assigned on a racial basis; blacks were directed to join only all black clubs operated by the "Negro branch" and whites were ordered to join only all-white clubs overseen by the "white branch". (Pet. App. 27a). This deliberate systematic assignment of blacks and whites to the separate programs of the "Negro" and "white" branches, respectively, created a state mandated membership pattern that

fell along strictly racial lines. That pattern was every bit as real and enduring as the school attendance patterns created by the state's segregationist education practices.

The applicable Federal Regulations require NCAES to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. § 15.3(b)(6)(i) The Solicitor dismisses this regulation with the following somewhat cryptic comment.

> [W]here, as here, admissions are traditionally the product of private voluntary choice, an entity covered by Title VI has fulfilled this requirement to take affirmative action to overcome the effects of prior segregation in admissions when it has established a genuinely non-discriminatory system.

(U.S. Br. 38 n. 41). This passage appears to be a prediction that a bona fide freedom of choice plan will always succeed in eliminating "the effects of prior

segregation" in a case such as this. But as the Solicitor correctly notes elsewhere in his brief, whether freedom of choice or any other measure will prove sufficient to dissipate such effects is an intensely practical question, one which a court can resolve only by weighing the actual impact of a particular plan on the specific pre-existing de jure system at issue.

The Solicitor suggests that the decision in Green turned largely on the fact that freedom of choice represented a sharp departure from the traditional manner in which school authorities determined which students would attend which schools (U.S. Br. 46-50). But the Court in Green condemned the freedom of choice plan in that case, not because it was novel, but because it was ineffective. An equally ineffective freedom of choice plan was rejected on the same ground in

Board of Visitors v. Norris, 404 U.S. 907 (1971) aff'g Norris v. State Council of Higher Education, 327 F. Supp. 368 (E.D. Va.), even though its use in that case was not novel. See also Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979). The use of a neighborhood school assignment policy, which is certainly a traditional assignment practice, was disapproved on grounds of ineffectiveness in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

The Solicitor's description of the NCAES freedom of choice plan as "traditional" is not entirely accurate. Prior to 1965 residents of North Carolina enjoyed no freedom to choose a club whose racial composition they preferred; whites were required to join all white clubs, and blacks were limited to all black clubs. Since 1965 there has been no freedom of

choice regarding 4-H and Extension Homemaker activities at the county or state level; following the adoption of Title VI NCAES merged previously all white and all black county and state activities into unitary integrated operations. Only at the community level, and only since 1965, have North Carolinians been afforded an opportunity to select a 4-H or extension homemaker program based on its racial composition.

The Solicitor urges, finally, that the circumstances of this case are analogous to the facts in Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976). The Solicitor characterizes the Pasadena school board as having merely adopted a "racially neutral student assignment plan" (U.S. Br. 45); in fact, however, the Pasadena plan required the race-conscious reassignment of students so

as to assure that no school in the district was more than 50% non-white. 427 U.S. at 428. It was only after the board had thus eliminated the racial identifiability of its schools that apparently unrelated population shifts began to increase the minority concentrations at several schools. Unlike the board in Pasadena, however, NCAES has never implemented or achieved "a racially neutral attendance pattern," 427 U.S. at 437, that might break the causal connection between past de jure segregation and present racial separation.

(3) We noted in our principal brief, as had Judge Phillips in his dissenting opinion, that the record in thic case presents substantial evidence that club members are intentionally recruited on a racial basis. (Pet. Br. 92-93, 95-96; Pet. App. 475a-79a). Neither court below

purported to decide whether such recruiting had in fact occurred; the district court's suggestion that white club leaders would "strong[ly] resis[t]" integration of the clubs raises at the least an inference that those whites are not voluntarily recruiting blacks for the numerous existing all-white clubs. (Pet. App. 184a.) As of 1980, over 97% of the individuals responsible for recruiting for the all-white club were themselves white. (GX 11) In this Court neither the Solicitor nor the respondents argue that racial discrimination in recruiting is either legal or constitutional, deny that such recruiting occurs, or suggest that the lower courts addressed this issue. The district court should be directed on remand to resolve this claim, and to grant whatever injunctive relief may be necessary to eliminate such discrimination.

CONCLUSION

For the above reasons the judgment of the court of appeals should be reversed.

Respectfully submitted,

J. LeVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013

Counsel for Petitioners

*Counsel of Record